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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER DUCKWORTH,

Defendant and Appellant.

B288899

Los Angeles County
Super. Ct. No. GA102350

**ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING**

THE COURT:*

The opinion filed April 5, 2019, in the above entitled matter is modified in the following manner:

1. The following sentence is deleted from the last paragraph on page 10:

Yet as the court also noted, Duckworth has an “incredibly serious” and “consistent” criminal history that is “basically unbroken” for the past seven years.

In that sentence’s place, the following is added:

Yet as the court also noted, Duckworth has an “incredibly serious” and “consistent” criminal history that is “basically unbroken” for the past six years.

2. The following is deleted from the first paragraph on page nine:

Duckworth was of similar height, weight, and build as the videotaped burglar, and his shoes and distinctive walking style matched as well.

There is no change in judgment.

Appellant’s petition for rehearing is denied.

*STRATTON, Acting P.J.

WILEY, J.

ADAMS, J.ⁱ

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APPEAL from a judgment of the Superior Court of Los Angeles County, Jared D. Moses, Judge. Affirmed in part, reversed in part, and remanded with directions.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Kristen J. Inberg, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Christopher Duckworth of two counts of first degree residential burglary, one count of attempted first degree residential burglary, and one count of conspiracy to commit residential burglary. As a recidivist, Duckworth's sentence was 120 years to life.

Code references are to the Penal Code unless otherwise noted.

On appeal, Duckworth makes eight arguments:

(1) evidence of an earlier burglary was improperly admitted; (2) insufficient evidence supported the verdict; (3) he is outside the spirit of the Three Strikes Law; (4) his attempted burglary sentence should be stayed under section 654, subdivision (a); (5) section 667, subdivisions (c)(6) and (7), does not mandate consecutive sentencing for the attempted burglary; (6) his sentence is cruel and unusual punishment; (7) the court erroneously instructed the jury; and, (8) the case should be remanded to allow the trial court to exercise discretion in light of Senate Bill No. 1393 (2017–2018 Reg. Sess.), which we abbreviate as SB 1393.

We agree with Duckworth that section 667, subdivisions (c)(6) and (7), does not mandate consecutive sentencing for the attempted burglary. Thus we remand for the trial court to exercise its sentencing discretion. We also remand for resentencing under SB 1393. We otherwise affirm.

I

We recount facts in a light favorable to the prevailing trial party.

On the morning of August 21, 2017, Jared Cohen left his home on Quinto Lane in Los Angeles. When he returned that night, he found his home ransacked. The situation bespoke

invasion: lights were on, items were strewn, window slats were out. Things were missing: four watches, sunglasses, two expired driver's licenses, and his passport. The missing items were worth \$3,200.

Now we shift our geographic focus from Los Angeles to Tarzana. Emily Rivera is a child care provider for the Champnella family, which has a home on a slope off Charles Street in Tarzana. On the afternoon of August 24, she pulled her truck up to the Champnella's home. She saw a man rolling down the slope from the home with another man running behind him. They were covered from head to toe, wearing gloves and dark clothes. Their hoodies were cinched up to cover their faces. They were around 5 feet, 10 inches tall. Rivera honked her horn, the two men jumped into a silver Kia, and the Kia "gunned it out of there." Rivera called 911 and recited the Kia's full license plate.

From Tarzana, we shift again, now to Pasadena. Mark Harris lives on Laguna Road in Pasadena. On September 3, 2017, Harris was out of town. That afternoon, security cameras captured two sets of images.

First, a silver Kia made a U-turn in front of the home, and then drove slowly out of view. At 1:13 p.m., the cameras recorded two men in cinched-up hoodies coming onto Harris's property. One man tried to kick open a door to the home. The door cracked but did not break. At 1:14 p.m., the men ran out of camera view.

Second, the men returned at 2:12 p.m. and at 2:14 p.m. they ran back out. The master bedroom window was broken, and movement inside the home triggered its alarm system. Police responded. A pillowcase on the bed was missing, as were coins, credit cards, IDs, and two watches. Other belongings were

scattered on the floor and outside the home. The missing watches were worth between \$1,400 and \$2,000.

Pasadena Police Officer Matthew Crawford investigated the events at the Harris house. From security cameras, Crawford made out two numbers on the Kia's license plate. He found one match in a database: a Kia Optima with the license plate reported by Rivera.

Crawford got security camera footage from a building where the Kia had been spotted. The footage showed the car's driver had a similar build to one of the Harris intruders. The driver also had the same shoes and distinctive walking style.

Police looked for and stopped the Kia. Duckworth was driving. The officer searched the car and found gray gloves and Cohen's driver licenses and passports. Duckworth is about 6 feet, 2 inches tall.

Duckworth lived with his mother. Crawford got her phone records. Mother testified she had two phones registered to her; she remembered only one number, which was not the phone for which Crawford got records. She said she lost the other phone months before the time of the intrusions. Before the phone went missing, Mother and Duckworth both used it.

On the day of each notable event, that phone was near a cell tower that was near the scene of the event. On the day a police car scanned the Kia's license plate, the phone was near a cell tower close to the location where the plate was scanned.

Now we shift to Beverly Hills. Years before these events, on a morning in 2013, a guard watching a security camera saw Duckworth and two others approach a home on Schuyler Road in Beverly Hills. Duckworth wore a black jumpsuit and had socks on his hands. The guard called police. An officer saw Duckworth

coming out of the bushes by the home. When asked what he was doing there, Duckworth said he “got stranded in Hollywood and he was looking for a train. And the reason why he was in the shrubs was because he was looking in the shrubs.” The officer asked Duckworth where his two friends were. Duckworth said he was alone. The police found the two others and arrested them all. The home’s game console was on the lawn. Also on the lawn was a pillowcase from the bed. A safe and coin container had been moved within the home.

During the trial in this case, the court admitted evidence of this 2013 Beverly Hills burglary. It instructed the jury it could consider the burglary for three possible limited purposes: Duckworth’s intent; whether he had the knowledge or possessed the means that might have been useful to commit the charged crimes; or the existence of a conspiracy. The court told the jury it could not consider this evidence for any other purpose.

The jury found Duckworth guilty of four violations at three homes: for the Cohen home, (1) first degree residential burglary; for the Champnella home, (2) conspiracy to commit burglary; and for the Harris home, (3) attempted first degree residential burglary and (4) first degree residential burglary.

During the sentencing phase, Duckworth admitted to two earlier robbery convictions for the purposes of the Three Strikes Law (Pen. Code, §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). He admitted one of those earlier convictions for the five-year prior-felony enhancement (§ 667, subd. (a)(1)). Duckworth then asked the trial court to dismiss the enhancement prescribed by the Three Strikes Law. The trial court refused. The trial court determined the burglary and attempted burglary were separate acts and thus neither sentence should be stayed under section

654. For each count, it sentenced Duckworth to 25 years to life, plus five years for the prior-felony enhancement. The court ordered the sentences to be served consecutively; thus, the total sentence was 120 years to life.

II

The trial court did not abuse its discretion by admitting evidence of the 2013 Beverly Hills burglary. Evidence of an earlier crime is admissible when it is relevant to prove some fact like motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. (Evid. Code, § 1101, subd. (b).)

Intent was the key theory of admissibility. For this evidence to be properly admissible, the degree of similarity between the uncharged act and the charged offense must be of the “least degree.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) The uncharged misconduct must be similar enough to support the inference the defendant probably harbored the same intent in each instance. (*Ibid.*)

This case satisfies these tests. The least degree of similarity exists between the Beverly Hills burglary and all four incidents in this case. All display Duckworth’s intent to work with a group to break into the homes of others and to take things. All were at an unoccupied single family residence. All were during the day. As at the Beverly Hills home, belongings were strewn around the Cohen and Harris homes. And like the Beverly Hills burglary, the Champnella and Harris incidents involved multiple perpetrators. Duckworth covered his hands during the Beverly Hills burglary, as did the perpetrators at the Champnella home. The uncharged misconduct is similar enough to support the inference Duckworth had the same criminal intent in every episode.

Duckworth objects that these similarities are common to many burglaries. This point is not relevant because the prosecution did not offer the Beverly Hills evidence to prove identity. Rather, the theory was to prove Duckworth had the same bad intent. The Beverly Hills burglary was similar enough to support the inference Duckworth had the same criminal intent each time. This evidence supported that inference. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328 [citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402; cf. *People v. Jones* (2011) 51 Cal.4th 346, 371 [“The [earlier] robbery and the [currently charged] home invasion were not particularly similar, but they contained one crucial point of similarity—the intent to steal from victims whom defendant selected.”].)

Duckworth argues the danger of undue prejudice from the evidence of the Beverly Hills burglary was substantially greater than its probative value. He claims the evidence worked to “cement in the jurors’ minds that [he] was a residential burglar,” and “tempted” the jurors to convict him as punishment for the earlier burglary. Those arguments are general enough that, if accepted, they would bar courts from ever admitting evidence of an earlier burglary to prove intent for a later burglary. That is not the law. (See, e.g., *People v. Rocha* (2013) 221 Cal.App.4th 1385, 1393 [listing cases].)

Evidence is not prejudicial merely because it is damaging to the defendant. (*People v. Megown* (2018) 28 Cal.App.5th 157, 164.) All evidence probative of guilt damages a defendant’s legal position. Evidence not probative of guilt is apt to be irrelevant. For Evidence Code section 352, evidence is improperly prejudicial if it tends to evoke an emotional bias against the defendant as an individual and it has little effect on the issues. (*People v.*

Megown, supra, 28 Cal.App.5th at p. 164.) This trial court explicitly balanced the danger of undue prejudice. It reasoned that, in a case with multiple burglary-related charges, one earlier burglary was “not inflammatory” and would not create substantial danger of undue prejudice. That reasoning is not “arbitrary, capricious, or patently absurd,” and we affirm it. (*People v. Foster, supra*, 50 Cal.4th at pp. 1328–1329.)

Duckworth also complains it took much time to present evidence of the 2013 burglary. Possibly that was a waste of judicial resources. By itself, this waste did not prejudice Duckworth, because the evidence was otherwise proper. Requiring a second trial because the first one took too long would be illogical.

Admitting evidence of the earlier burglary did not violate Duckworth’s due process rights. Routine applications of state evidence law do not implicate a defendant’s constitutional rights. (*People v. Peyton* (2014) 229 Cal.App.4th 1063, 1079.)

III

Substantial evidence supported these convictions. Circumstantial evidence can suffice. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44–45.) Strong circumstantial evidence can be more powerful and more reliable than direct eyewitness testimony, which can be prone to predictable weaknesses.

We review the evidence in the light favorable to the party prevailing at trial to determine if a rational trier of fact could have found the elements of the crimes beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 324; *People v. Virgil* (2011) 51 Cal.4th 1210, 1263.)

The evidence was as follows.

Cohen home burglary. The home was ransacked. The Beverly Hills burglary shows intent. A cell phone linked to Duckworth was near the home on the day of the burglary. Duckworth was of similar height, weight, and build as the videotaped burglar, and his shoes and distinctive walking style matched as well. Most damning, the car Duckworth was driving contained Cohen's stolen items.

Champnella home conspiracy. A cell phone linked to Duckworth was near the home around the time of incident. The Beverly Hills burglary shows intent. An eyewitness saw disguised perpetrators run away from the home and flee in a car linked to Duckworth.

Harris home burglary and attempted burglary. A cell phone linked to Duckworth was near the home around the time of burglary. The Beverly Hills burglary shows intent. A car linked to Duckworth was at the house before perpetrators approached it. Video shows disguised men trying and failing to kick down a door. Video shows men return an hour later. The house was ransacked.

From this circumstantial evidence, a rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. (*People v. Zaragoza, supra*, 1 Cal.5th at pp. 44–45.)

Duckworth points to a variety of exculpatory facts: the Kia was not registered to Duckworth, his mother said the relevant phone went missing months before the incident, witnesses estimated the perpetrator's height as several inches shorter than his, and more. Other evidence, however, reasonably supported the verdict. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 358.

IV

The trial court properly denied Duckworth's request to dismiss the enhancement prescribed by the Three Strikes Law. (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d).) The relevant question was whether Duckworth is outside the scheme's spirit and thus should be treated as though he had not been previously convicted of one or more serious and/or violent felonies. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

At the trial level, Duckworth recognized the trial court's "Discretion is Very Broad And Will Seldom be Abused."

The trial court acknowledged Duckworth is young: 24 at the time of sentencing, and 23 at the time of the crimes. Yet as the court also noted, Duckworth has an "incredibly serious" and "consistent" criminal history that is "basically unbroken" for the past seven years. He had a sustained juvenile petition for robbery, for which he was sent to juvenile camp. A year after jurisdiction was terminated for the juvenile matter, he was arrested for the Beverly Hills burglary; he was sentenced to a year in county jail and five years probation. While on probation, he was arrested for two robberies twenty days apart; one victim said Duckworth had a gun. He was sentenced to three years in prison. Just months after his prison release, he committed these four crimes. The crimes involved sophistication and planning, as the trial court correctly found. The probation report recounts Duckworth is a gang member. Given this record, it was not outside the bounds of reason for the trial court to conclude, "prior probation didn't work, prior prison incarceration didn't work, parole didn't work. And so, unfortunately, notwithstanding his youth, I think Mr. Duckworth seems to be the type of individual

for whom the Three Strikes Law was designed.” (See *People v. Williams*, *supra*, 17 Cal.4th at pp. 162–163.)

V

The trial court properly determined the Harris home burglary and the attempted burglary were separate acts. Thus the court rightly refused to stay the attempted burglary sentence.

First we summarize the law. Penal Code section 654, subdivision (a) prohibits multiple punishments for a single act. (§ 654, subd. (a).) In *Neal v. State*, the California Supreme Court held that whether criminal conduct is one act depends on the intent and object of the actor. If all the offenses were incident to a single objective, the defendant may be punished for any one of the offenses but not for more than one. (*Neal v. State* (1960) 55 Cal.2d 11, 19, disapproved on other grounds by *People v. Correa* (2012) 54 Cal.4th 331, 344). Nominally, *Neal* remains valid law, but it has been modified by later decisions. (See, e.g., *People v. Correa*, *supra*, 45 Cal.4th at p. 334; *People v. Latimer* (1993) 5 Cal.4th 1203, 1211–1212, 1216.)

One modification of *Neal* is the opportunity-to-reflect test. This test is from *In re William S.*, where two youths broke into a home, stole from it, “waited an hour or hours,” and then returned through a door they left unlocked and stole more. (*In re William S.* (1989) 208 Cal.App.3d 313, 315, 317.) The court first analyzed whether multiple burglaries occurred, saying section 654 would not apply if there were only a single burglary. (*Id.* at p. 316.) Adopting a test from sex crime cases, the *William S.* court considered whether there was a pause between the entries long enough to give defendants an opportunity to reflect on their conduct. (*Id.* at p. 317.) In part because it decided that the defendant had an opportunity to reflect between break-ins, the

court ruled the youths had committed two burglaries. (*Id.* at pp. 317–318.) It then held section 654 did not bar multiple punishment because the crimes “were committed by means of two distinct and different entries, separated both in time and place, and with the intent to steal entirely different property. The second entry doubled the danger of violent confrontation.” (*Id.* at p. 319.)

Later courts applied the opportunity-to-reflect test to the section 654 inquiry itself, passing over the fact that *In re William S.* applied that test to the question of whether multiple burglaries occurred, not whether multiple punishments were prohibited under section 654. For example, *People v. Kwok* said, “As was noted in [*In re William S.*], a more useful test for determining the separateness of alleged multiple burglaries *for purposes of section 654* is whether the defendant had the opportunity to reflect after the first entry, and nevertheless entered the premises again.” (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1255 [emphasis added] [holding section 654 did not bar separate sentences for home entries that were nine days apart].)

Duckworth erroneously argues the opportunity-to-reflect test should not apply because (1) it was “incorrectly imported” from sex crime cases to burglary cases, (2) because it arose from later court’s failure to recognize *In re William S.*’s “dichotomy of analysis,” and (3) because it “essentially eviscerates the *Neal* course-of-conduct rule.”

The opportunity-to-reflect test has roots in sex crime cases, but applying it more generally makes sense. Section 654 aims to ensure punishment matches culpability. (*People v. Kwok, supra*, 63 Cal.App.4th at p. 1252.) People are more culpable if they

persist in criminal behavior despite opportunities for reflection. The more thoughtful and determined you are about breaking the law, the more blameworthy your lawless decision.

The sound logic of the test has led courts to apply it consistently for decades, no matter its origin. (See, e.g., *People v. Louie* (2012) 203 Cal.App.4th 388, 399 [holding section 654 did not bar separate sentences for arson and dissuading a witness where a pause of 15 minutes occurred]; *People v. Gaio* (2000) 81 Cal.App.4th 919, 935–936; *People v. Hicks* (2017) 17 Cal.App.5th 496, 514.) The opportunity-to-reflect test is helpful in this case. We adhere to precedent.

The test informs rather than annuls *Neal*. Whether people form a new “objective” for the purposes of *Neal* hinges, in part, on whether a reflective interval allows them to evaluate past information and to formulate future conduct.

Duckworth had ample opportunity to reflect, so his first objective of breaking into the Harris home was different from his second. During Duckworth’s first attempt, cameras recorded men coming onto Harris’s property, trying to kick open a door to his home, and then running out of view. The video footage does not show where the men went. An hour later, the two men reappeared. They broke a window, and movement inside the home triggered its alarm system. That elapsed hour is substantial evidence supporting the trial court’s finding. (*People v. Osband* (1996) 13 Cal.4th 622, 730–731 [upholding a trial court’s section 654 determination where it was supported by substantial evidence].)

This case thus is analogous to *In re William S.*, where the lapse of time between burglaries may have been as little as “an

hour,” and the court found two acts occurred. (*In re William S.*, *supra*, 208 Cal.App.3d at p. 317.)

People v. Goode does not change our analysis. (*People v. Goode*, (2015) 243 Cal.App.4th 484, 493.) The *Goode* decision held section 654 barred multiple punishments where a defendant opened a home’s storm door, and then “a few seconds later” tried to enter through a window. (*Ibid.*) The court recognized the defendant “literally” had an opportunity to reflect during the seconds between his attacks on the home. (*Ibid.*) But it reasoned that despite the relevance of the defendant’s opportunity to reflect, no new risk of violence was created by defendant’s second attempt to enter the home. (*Id.* at pp. 493–494.) An hour differs from a few seconds. It is longer. Duckworth had a meaningful and not merely literal opportunity to reflect. And unlike in *People v. Goode*, an elapsed hour created new risk of a violent confrontation. (See *In re William S.*, *supra*, 208 Cal.App.3d at p. 319 [“The second entry doubled the danger of violent confrontation.”].) Someone could have entered the house between Duckworth’s break-in attempts, just as Emily Rivera unexpectedly appeared at the Champnella house.

Duckworth argues his return to Harris’s home created no new risk because Harris was out of town. This post-hoc logic is inventive but incorrect. Duckworth did not know Harris’s plans at the time. Just as Rivera surprised Duckworth in August, so too could a house sitter or cleaner or other authorized person have surprised him in September. Duckworth accepted this risk to achieve his goal. Culpability turns on the actor’s intent at the moment of action, and section 654 aims to match punishment with culpability. (*People v. Kwok*, *supra*, 63 Cal.App.4th at p. 1252.) We have no basis for reversing the trial court result.

Duckworth cites *People v. Harrison* for the proposition that “[i]t is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible.” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) *Harrison* pre-dates *Kwok*’s application of the opportunity-to-reflect test to section 654 analysis. And *Harrison* upheld multiple punishments even though they arose from a single sexual assault that lasted seven to ten minutes, rejecting the defendant’s argument that the assault was a “continuous ‘violent’ transaction.” (*People v. Harrison, supra*, 48 Cal.3d at pp. 325–326, 336, 338.) *Harrison*’s point was that multiple acts can occur over a relatively short interval. That happened here. Section 654 does not bar the multiple punishments.

VI

The Three Strikes Law does not mandate consecutive sentencing for the burglary and attempted burglary of the Harris home. The trial court’s contrary decision was error. Consecutive sentencing is mandatory where two or more felony convictions were “not committed on the same occasion” and do not arise “from the same set of operative facts.” (Pen. Code, § 667, subds. (c)(6) & (7); *People v. Lawrence* (2000) 24 Cal.4th 219, 233.) Consecutive sentencing is not mandatory under Penal Code section 667 simply because multiple punishments are permitted under Penal Code section 654. (*People v. Lawrence, supra*, 24 Cal.4th at p. 232, fn. 3.)

The trial court did not determine whether Duckworth left Harris’s property between the attempted entry and successful entry. It concluded “we don’t know exactly where [the burglars] went.” In the absence of a factual finding, we independently review the trial court’s ruling to determine if “consecutive

sentencing was statutorily required.” (*People v. Durant* (1999) 68 Cal.App.4th 1393, 1402, fn. 8.)

Duckworth committed the burglary and attempted burglary at the same home and against the same victims. This means Duckworth’s crimes arose “from the same set of operative facts.” (*People v. Lawrence, supra*, 18 Cal.4th at p. 233.)

People v. Durant, supra, 68 Cal.App.4th at pages 1406 to 1407 is inapposite. It held consecutive sentencing was mandatory for two attempted burglaries and a completed burglary where a defendant moved from one condominium home to another, committing serial burglary attempts. (*Id.* at pp. 1397–1398 & 1406–1407.) The defendant then succeeded in burglarizing a third home, at which point waiting police arrested him. (*Id.* at p. 1398.) For each crime, the home was different and the victims were different. These crimes did not arise “from the same set of operative facts.” *Durant* does not apply.

We remand for the trial court to apply its discretion in determining whether consecutive sentencing is appropriate.

VII

Duckworth asks us to hold that his punishment is unconstitutionally cruel and unusual. This claim requires a fact specific inquiry and is forfeited if not raised below. (*People v. Baker* (2018) 20 Cal.App.5th 711, 720.)

Duckworth concedes his trial counsel did not argue his sentence was cruel and unusual. However, he contends his trial counsel rendered ineffective assistance by failing to raise a constitutional objection to Duckworth’s sentence. To prove ineffective assistance of counsel, a defendant must show that counsel’s representation fell below an objective standard of reasonableness and that, but for counsel’s unprofessional errors,

the result of the proceeding would have been different.
(*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.)
Duckworth’s briefing states, but does not attempt to demonstrate,
that his lawyer flunked this test. We have no basis to find
Duckworth’s counsel rendered ineffective assistance.

VIII

In reply, Duckworth raises a potential instructional error for the first time. According to the reporter’s transcript, the trial court instructed the jury that the evidence on the Beverly Hills burglary, “if believed, *may be* considered by you to prove that defendant is a person of bad character or that has [sic] a disposition to commit crimes.” The clerk’s transcript contained a “not” between “may” and “be,” trial counsel did not object when the instruction was read to the jury, and Duckworth’s reply brief concedes that the omission of “not” in the reporter’s transcript “may be reporter error.”

An appellant does not forfeit an instruction issue by failing to object at trial where the issue involves substantial constitutional rights. (*People v. Felix* (2008) 160 Cal.App.4th 849, 857.) But an issue is forfeited if it is not raised in an appellant’s opening brief. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1218–1219 [“[I]t is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party.”] [quoting *People v. Tully* (2012) 54 Cal.4th 952, 1075.].) Thus, Duckworth has forfeited any argument to instructional error by failing to raise it in his opening brief.

IX

Finally, Duckworth requests that this case be remanded to allow the trial court to exercise its discretion under SB 1393. SB

1393 amended the Penal Code to provide trial courts with discretion to strike, in the interests of justice, five-year prior-felony enhancements imposed under section 667, subdivision (a)(1).

The parties agree that SB 1393 applies to this case. But the prosecution argues that remanding this case is unnecessary because the trial court clearly indicated it would not exercise its discretion under the new bill. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [holding that in light of a new senate bill, remanding for resentencing was required unless the record showed the trial court clearly indicated it would not have exercised its discretion.])

In analyzing whether Duckworth fell within the spirit of the Three Strikes Law, the trial court ruled harsh punishment was appropriate for Duckworth. But we remain unsure whether the trial court would exercise its discretion to dismiss five-year prior-felony enhancements. In applying the five-year enhancements, the trial court said, “I *have to* impose the five-year prior on each serious felony count” and “I *have to* impose that five-year prior four times.” This language suggests the perception of a mandatory duty. We therefore remand.

DISPOSITION

We remand for the trial court to apply its discretion in determining whether consecutive sentencing is appropriate for the attempted burglary. We also remand to allow the trial court to determine whether to dismiss Duckworth's five-year enhancements based on SB 1393. The judgment is otherwise affirmed.

WILEY, J.

WE CONCUR:

STRATTON, Acting P. J.

ADAMS, J.*

ⁱ Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.